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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**CARL BLAKE MILLER,**

**Defendant and Appellant.**

**A140524**

**(Contra Costa County  
Super. Ct. No. 121980-7)**

A jury convicted appellant Carl Blake Miller of a number of theft and forgery related offenses. The trial court then sentenced Miller to a term of imprisonment, citing a number of factors it found relevant to its sentencing decision. The court imposed the upper term for the first offense of which Miller was convicted and then imposed consecutive, rather than concurrent, sentences for the remaining counts.

On appeal, Miller challenges the trial court's sentencing decisions. We have examined his contentions and find them unpersuasive. Accordingly, we will affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

Miller was convicted of eight theft and forgery related crimes based on a series of fraudulent real estate transactions and loans involving the Geneva Fund, an investment fund he operated on behalf of investors. On appeal, Miller challenges only the trial court's discretionary sentencing choices. We will therefore provide only a brief synopsis of the facts of the underlying crimes, outlining the fraudulent transactions for which he

was convicted. Additional facts relevant to the issues raised on appeal are contained in the discussion section of this opinion.

First, as charged in count seven of the information, Miller embezzled approximately \$740,000 from the Geneva Fund. On several occasions, he obtained unsecured loans from the fund and had the loan proceeds deposited in his personal bank account. The funds were used to pay for the remodeling of his home and other personal expenditures. Miller then falsified the loan paperwork to show that Richard Sherill, a contractor working on his home, was the borrower, rather than Miller. Miller never repaid the loans. When a Geneva Fund investor later confronted him, Miller admitted he had misappropriated the funds.

Second, count two of the information charged Miller with misappropriating approximately \$100,000 from Robert Allen Weiss. Weiss had made several previous investments through Miller. In 2009, he asked Miller if he knew anyone who was looking to sell promissory notes or deeds of trust at a discount. Miller told Weiss he had a client willing to sell promissory notes with a face value of \$192,000, secured by a deed on the Lighthouse Lodge in Monterey and another property in Martinez. Miller represented to Weiss that the notes were held by one of his (Miller's) clients and secured by the two properties. Contrary to Miller's representations, however, the client held no note on the Lighthouse Lodge and had not spoken to Miller about selling the note on the Martinez property. Weiss agreed to buy the notes for \$100,000, and Miller acted as a facilitator and received a portion of the interest paid on the loans. Miller initially instructed Weiss to transfer the money to a Geneva Fund account, but Miller changed the wiring instructions so the \$100,000 was wired directly to his personal account. Weiss did not receive the notes and never recovered his investment. When he later confronted Miller, the latter admitted he had misappropriated the funds.

Third, counts three and five of the information charged Miller with misappropriating approximately \$300,000 from Dr. David Greenly. Dr. Greenly made two loans to Miller. The first was for \$200,000, secured by a deed of trust on Miller's property at 1 Northwood Drive in Orinda, and the second was for \$100,000 secured by a

deed of trust on the Joseph Building, a property Miller owned in Truckee, California. Initially, Miller made interest payments on both loans and made one \$20,000 payment towards principal on the second loan, but he later ceased payments. Without Dr. Greenly's knowledge, Miller recorded forged deeds of reconveyance on both properties, wiping out Dr. Greenly's security interest in them.<sup>1</sup> The remainder of the loans Dr. Greenly made were never repaid.

Fourth, as charged in count four, Miller defrauded Siavash Afshar. In 2006, Afshar loaned Miller \$100,000, secured by a deed of trust on the Joseph building. Without Afshar's permission, Miller forged Afshar's signature on documents and sold the promissory note on the loan. Miller also recorded a fraudulent assignment of deed of trust wiping out Afshar's security interest in the Joseph Building.

Fifth, Miller also defrauded Dr. Joseph Kohen, Dr. Barton Brown, and Dr. Walter Kran. Miller facilitated a loan by the doctors to an entity called the Ventura Club LLC in the amount of \$750,000, which was secured by two properties in Ventura, California. Without the doctors' permission, Miller sold the note to Gene Campbell and recorded a deed wiping out their security interest in the property. Although Dr. Kohen later received a share in a different loan held by the Geneva Fund, he was never fully repaid his investment and was unable to cash out his interest in the substituted loan.

Finally, Miller served as the treasurer of his son's Boy Scout troop in Orinda. As treasurer, he had access to the troop's bank account, which was funded by troop members' dues and used to pay for outings and cover operating expenses. During his tenure as treasurer, Miller made two unauthorized withdrawals from the account, one for \$10,000 and one for \$6,000. Although Miller later replaced the funds, he took 10 days to repay the \$10,000 withdrawal and over six weeks to repay the \$6,000 withdrawal.

On November 15, 2012, the Contra Costa County District Attorney filed an information charging Miller with four counts of grand theft by embezzlement, each with

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<sup>1</sup> Miller's attempts to pass the forged deed of reconveyance for Dr. Greenly's interest in the Joseph Building to an attorney and a title company were the basis of the charges of passing a forged document in count six.

a special allegation for a loss greater than \$50,000 (Pen. Code §§ 487, subd. (a), 12022.6, subd. (a)(1)<sup>2</sup>; counts one, two, seven, & eight); three counts of attempting to file a false instrument (§ 115, subd. (a), counts three, four, & five); and one count of forgery (§ 470, subd. (d); count six). The information also alleged an enhancement for related felonies resulting in a loss greater than \$500,000 (§ 186.11, subd. (a)(2)).

On October 4, 2013, a jury found Miller guilty on all counts, and found the special allegations and sentencing enhancement to be true. On November 15, 2013, the court sentenced Miller to a total term of 12 years, 8 months in state prison, consisting of the upper term of three years on count one, the upper term on the sentence enhancement, plus consecutive sentences of one-third the midterm on the remaining counts. Miller then filed a timely appeal.

## DISCUSSION

Miller argues the trial court abused its discretion by denying him probation and by imposing the upper term for the grand theft by embezzlement charged in count one. He also contends the court relied on improper factors in imposing consecutive sentences on the remaining counts. We will address these arguments in the order presented.

### I. *The Trial Court Did Not Abuse its Discretion in Denying Miller Probation*

Miller contends the trial court abused its discretion in denying him probation, because it failed to give sufficient weight to a number of mitigating factors. As we explain, we must reject Miller's argument because he asks us to substitute our judgment for that of the trial court.

#### A. *Factual Background*

At sentencing, the court discussed several factors on which it based its decision. We summarize its ruling below, with citations to the sentencing criteria enumerated in California Rules of Court, rule 4.414.<sup>3</sup> As our summary shows, the court's ruling demonstrates it carefully considered facts relating to both the crime and to the defendant.

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<sup>2</sup> All statutory references are to the Penal Code.

<sup>3</sup> All further rule references are to the California Rules of Court.

The court referred to the seriousness of the crime and the degree of monetary loss to his victims, noting Miller's actions had "depleted the life savings of people" and involved "nearly \$2 million[.]" (Rule 4.414(a)(1), (5).) The court also recognized Miller had abused the trust of friends to steal from them and had abused a position of trust by stealing from the Boy Scouts. (Rule 4.414(a)(9).) In addition, as the court noted, many of Miller's victims "were elderly . . . and they were much more vulnerable than other individuals in the same position." (Rule 4.414(a)(3).) Moreover, Miller masterminded a sophisticated, four-year fraudulent scheme, and the trial court found he hid it in "a very complicated manner [in] which he was covering himself and trying to prevent people from discovering what was going on by changing names on loans . . . by filing false deeds and yet continuing to make interest payments in an attempt still to cover up what he was doing." (Rule 4.414(a)(6) [defendant was active participant], (a)(8) [manner in which crime was carried out "demonstrated criminal sophistication or professionalism on the part of the defendant"].) Finally, the court's comments reflect its awareness that Miller's crime was not "committed because of an unusual circumstance, such as great provocation" and was instead committed because Miller, although already affluent and educated, simply wanted to have more. (Rule 4.414(a)(7).)

The court's comments also show it considered numerous facts relating to the defendant himself. (Rule 4.414(b).) It first noted Miller's lack of criminal record. (Rule 4.414(b)(1).) The court referred specifically to the likely effect imprisonment would have on Miller's children, but it found that not sending Miller to prison would send them the message that "their father can go out and steal nearly \$2 million of money and nothing happens to him." (Rule 4.414(b)(5).) The court commented extensively on Miller's lack of remorse, noting Miller had attempted to shift the blame for his crimes onto two of his employees and had displayed a smirking, entitled demeanor throughout the trial. (Rule 4.414(b)(7).) In apparent reference to Miller's suitability for probation, the court considered Miller's minimal efforts to find employment so that he could make restitution to the victims, remarking that he had only submitted online applications to

Starbucks and Best Buy rather than actively looking for work.<sup>4</sup> (Rule 4.414(b)(3); see Advisory Com. com., 23 pt. 1B West’s Ann. Codes, Rules (2006 ed.) foll. rule 4.414 [court may consider defendant’s “apparent sincerity”].)

B. *Governing Law and Standard of Review*

“Probation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court.” (*People v. Pinon* (1973) 35 Cal.App.3d 120, 123.) California Rules of Court, rule 4.414 sets out some of the criteria the trial court may consider in exercising its discretion. The trial court is not limited to those factors, and it may consider others not enumerated in the rules so long as the court states any additional criteria on the record. (Rule 4.408(a).) The criteria enumerated in the rules will be deemed to have been considered by the sentencing judge “unless the record affirmatively reflects otherwise.” (Rule 4.409.)

“A defendant who is denied probation bears a heavy burden to show the trial court has abused its discretion. [Citations.] Furthermore, ‘a denial of probation after consideration of the application of its merits is almost invariably upheld. [Citations.]’ [Citation.]” (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1157.) As a reviewing court, it is not our function to substitute our judgment for that of the sentencing judge. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.) On appeal, we may not reweigh the sentencing factors. (*People v. Scott* (1994) 9 Cal.4th 331, 355.) Instead, we limit our review to a single issue—“whether the sentencing court abused its statutory discretion.” (*People v. Jordan* (1986) 42 Cal.3d 308, 317.) In the absence of a showing that the sentencing decision was irrational or arbitrary, we must presume the trial court acted to achieve legitimate sentencing objectives, and its discretionary determination will not be set aside on review. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-

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<sup>4</sup> Beyond these facts, the court considered and rejected mitigating factors Miller cited, finding they were not compelling. Specifically, it observed that although Miller had no prior criminal history, he was arrested on a DUI charge while this case was pending, and he failed to report the arrest to the probation department.

978.) We may not reverse the sentencing court's decision merely because reasonable people might disagree with it. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

C. *We May Not Reweigh the Sentencing Criteria*

On appeal, Miller argues the trial court erred by failing to give what he views as appropriate consideration to certain factors, such as his low likelihood of reoffending, the lack of danger to the community, and his willingness to comply with the terms of probation. As the sentencing judge correctly observed, however, a single factor may be determinative in the sentencing decision. (E.g., *People v. Forster* (1994) 29 Cal.App.4th 1746, 1758 [single factor is sufficient to justify the court's sentencing choice].) Moreover, when sentencing a defendant, the court is not required to review in detail each of the mitigating factors upon which the defendant relies. Indeed, a court can reject all mitigating factors without explanation. (See *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583 [court need not explain its reasons for rejecting mitigating factors].)

Distilled to its essence, Miller's argument is that the sentencing court should have weighed the criteria differently and placed greater emphasis on the mitigating evidence offered in support of a sentence of probation, while discounting the aggravating factors. Simply put, Miller asks us to do exactly what the California Supreme Court has said we may not do—reweigh the sentencing factors. (*People v. Scott, supra*, 9 Cal.4th at p. 355 [appellate court will not “reweigh valid factors bearing on the decision below”]; *People v. Jordan, supra*, 42 Cal.3d at p. 317 [“The Court of Appeal . . . erred when it reweighed the circumstances in mitigation rather than limiting its review to whether the sentencing court abused its statutory discretion.”].) The high court has made clear the only question before us is whether the sentencing court abused its discretion. Here, given the lower court's “lengthy and reasoned explanation for its sentence choice,” we cannot say its decision was arbitrary and capricious. (*People v. Downey* (2000) 82 Cal.App.4th 899, 910.) We therefore conclude the court did not abuse its sentencing discretion in denying probation. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 366 [no abuse of discretion in denial of probation to 61-year-old, first-time offender convicted of perjury and theft of client funds, where thefts arose from defendant's abuse of a position of trust

created by an attorney-client relationship, defendant conducted himself in a manner demonstrating criminal sophistication, and defendant failed to show remorse], disapproved on another point in *People v. Whitmer* (2014) 59 Cal.4th 733, 741-742.)

II. *The Trial Court Did Not Abuse its Discretion in Imposing the Upper Term for Count One*

Miller argues that even if the trial court did not err in denying probation, it abused its discretion in imposing the upper term on count one, grand theft by embezzlement, and on the enhancement under section 186.11, subdivision (a)(2), for a loss in excess of \$500,000. We cannot agree. As was true of his argument regarding the court's denial of probation, this argument asks us to reweigh the evidence presented to the sentencing court and reach a different conclusion. That is not the function of a reviewing court. We reject Miller's contention for the reasons that follow.

A. *Governing Law and Standard of Review*

The Penal Code makes grand theft by embezzlement punishable by either 16 months, two years, or three years imprisonment. (§§ 487, subd. (a), 1170, subd. (h)(1).) Section 186.11, subdivision (a)(2) then provides for a sentence enhancement of two, three, or five years if the jury finds the defendant's pattern of related felony conduct resulted in a loss greater than \$500,000, as the jury here found. In imposing a sentence of imprisonment, "the sentencing judge must select the upper, middle, or lower term on each count for which the defendant has been convicted[.]" (Rule 4.420(a).) To determine the appropriate sentence, the trial court weighs the factors in aggravation, found in rule 4.421, against those in mitigation, found in rule 4.423. (See Rule 4.420(b) [sentencing judge may consider circumstances in aggravation and mitigation "and any other factor reasonably related to the sentencing decision"].) The relevant rules also permit the sentencing judge to consider factors not specifically enumerated in rules 4.421 and 4.423. (Rules 4.408, 4.420(b).)

On appeal, we review the trial court's sentencing decision for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) We must affirm the lower court's sentencing decision "unless there is a clear showing the sentence choice was arbitrary or



irrational[.]” (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) An appellant “bears a heavy burden” when attempting to show the trial court has abused its sentencing discretion. (*People v. Bradley* (2012) 208 Cal.App.4th 64, 89.) “ ‘In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.]” (*Alvarez, supra*, 14 Cal.4th at pp. 977-978.)

The trial court abuses its discretion “if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision.” (*People v. Sandoval, supra*, 41 Cal.4th at p. 847.) “ ‘[U]nless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors.’ [Citation.]” (*People v. King* (2010) 183 Cal.App.4th 1281, 1322.) “Under California’s determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term.” (*People v. Black* (2007) 41 Cal.4th 799, 813.)

B. *The Sentencing Criteria Cited by the Trial Court Adequately Support Imposition of the Upper Term*

We have already recounted the lower court’s sentencing ruling and will not repeat it in detail here. In brief, however, after the court found Miller had failed to take responsibility for his crimes and had abused a position of trust, it announced its intent to sentence him to the upper terms of three years on count one and five years on the sentence enhancement. The court remarked that the victims were particularly vulnerable because they were Miller’s friends and had put their trust in him and also that a number of the victims were elderly, and thus particularly vulnerable. (Rule 4.421(a)(3), (11).) The court found that the manner in which he carried out the crime indicated a great deal of sophistication and planning. (Rule 4.421(a)(8).) Additionally, the court again noted that Miller had failed to accept responsibility and attempted to shift blame to others. Finally, the court stated it was using the rules of court merely as a guideline, and that all of the additional factors discussed earlier regarding Miller’s arrogance during the trial,

the magnitude of the crimes, and the abuse of a position of trust were sufficient to impose the aggravated term.

Miller's opening brief acknowledges the sentencing judge found there were a number of aggravating factors supporting imposition of the upper term. Despite this, he argues "there were other factors present that supported a lower or middle term sentence." Even if Miller is correct, pointing to the existence of mitigating factors does not demonstrate an abuse of discretion by the sentencing court. The court below was vested with wide discretion in weighing the aggravating and mitigating factors. (*People v. Lamb, supra*, 206 Cal.App.3d at p. 401.) The court could have imposed the upper term based on the existence of a *single* aggravating factor (*People v. Black, supra*, 41 Cal.4th at p. 813), and here its oral ruling specifically referred to three—the vulnerability of the victims, Miller's abuse of a position of trust, and the sophistication and planning involved in the crimes. And while Miller suggests the court should have accorded greater weight to mitigating factors, the court specifically explained why it chose to disregard some of those factors, such as Miller's claimed remorse and alleged efforts to make restitution. The court was entitled to balance the aggravating and mitigating factors " 'against each other in qualitative as well as quantitative terms.' [Citation.]" (*People v. Lamb, supra*, 206 Cal.App.3d at p. 401.) Its sentencing decision is amply supported by the record and was not an abuse of discretion. (See *People v. Bradley, supra*, 208 Cal.App.4th at pp. 89-90 [no abuse of discretion where court considered defendant's abuse of position of trust, active participation in crime, and lack of unusual circumstances in imposing midterm].)

### III. *The Trial Court Did Not Err in Imposing Consecutive Sentences*

In his supplemental opening brief, Miller contends the trial court should have imposed concurrent rather than consecutive sentences on counts three and five, because they involved the same victim as count six. Miller further contends this argument has not been forfeited by trial counsel's failure to object below, because (1) the alleged error constitutes an unauthorized sentence that may be challenged at any time or (2) any

objection would have been futile.<sup>5</sup> We reject Miller’s argument, for even if we assume the trial court relied on improper factors, any error was harmless.

A. *Factual Background*

After announcing its intention to sentence Miller to the upper term on count one and the enhancement, the court stated it would sentence him “consecutive on each and every [remaining] count, the reasons being that there are separate victims.” In addition to the existence of multiple victims, the court observed Miller had abused a position of trust, particularly in stealing from the Boy Scouts. The court said it was incorporating the comments it had made when it announced its tentative ruling “so I do not have to repeat all the reasons I gave for aggravating and consecutive counts as well as imposing the aggravated term on the 186.11(a)(2) enhancement.”

Miller contends the trial court erred because there was only one victim, Dr. David Greenly, as to the two counts of attempting to file a false document (counts three & five) and the one count of forgery charged in count six. He therefore argues the record lacks substantial evidence to support the trial court’s decision to impose the consecutive term for these three counts. He contends we must remand for resentencing because “it cannot be said with confidence that the trial court would impose the same sentence absent the invalid factor.” We disagree.

B. *Governing Law and Standard of Review*

“[A] trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear showing of abuse,

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<sup>5</sup> The People correctly note that Miller’s trial counsel failed to object to the consecutive sentences below, and they therefore contend the issue has been forfeited. (See, e.g., *People v. Scott*, *supra*, 9 Cal.4th at p. 354 [“claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner”].) We will overlook the absence of an objection in this case, however, because “applying a forfeiture rule in this circumstance would likely have the effect of converting an appellate issue into a habeas corpus claim of ineffective assistance of counsel for failure to preserve the question by timely objection. . . . [W]e [are] loath to invoke a rule that would proliferate rather than reduce the nature and scope of legal proceedings.” (*People v. Butler* (2003) 31 Cal.4th 1119, 1128.)

the trial court's discretion in this respect is not to be disturbed on appeal. [Citation.] Discretion is abused when the court exceeds the bound of reason, all of the circumstances being considered. [Citations.]" (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) Rule 4.425 sets forth a nonexclusive list of criteria the court may consider in determining whether a sentence should be concurrent or consecutive. Any circumstance in aggravation or mitigation may be considered in determining whether to impose consecutive rather than concurrent sentences, except for a fact used to impose the upper term, a fact used to otherwise enhance the defendant's prison sentence, or a fact that is an element of the crime. (Rule 4.425(b).) However, " '[i]mproper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error." ' [Citation.] Only a single aggravating factor is required to . . . impose a consecutive sentence[.]" (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

### C. Any Error Was Harmless

Even if the sentencing judge improperly relied on the existence of separate victims in imposing consecutive terms for counts three, five, and six, we agree with the People that any error was harmless. The court could have imposed a consecutive sentence based on a single aggravating factor. (*People v. Osband, supra*, 13 Cal.4th at pp. 728-729.) Resentencing is necessary only if it is reasonably probable that a more favorable sentence would have been imposed in the absence of the error. (See, e.g., *People v. Avalos* (1984) 37 Cal.3d 216, 233, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) As the People argue, the lower court was clearly outraged by Miller's conduct. In its ruling, it listed several factors supporting its decision to impose the upper term and to run the sentences consecutively. Any one of these factors would have provided a sufficient basis to impose consecutive terms. Therefore, there is no reasonable probability that the court would have imposed a more favorable sentence had counsel noted that certain of the counts involved the same victim. "Were we to remand, the court could simply omit reference to

these factors in justifying one or the other sentencing choice. Such an exercise is unnecessary.” (*People v. Huston* (1989) 210 Cal.App.3d 192, 223.)

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.

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